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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. WESLEY DARRYL MCINTOSH, Defendant and Appellant.	B206367 (Los Angeles County Super. Ct. No. BA332501)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard S. Kemalyan, Judge. Affirmed.

Wesley D. McIntosh, in pro. per.; and Michael John Shultz, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Wesley Darryl McIntosh appeals from the judgment entered following his conviction after a jury trial, at which he represented himself, for sale of cocaine base and possession of drug paraphernalia. No meritorious issues have been identified following a review of the record by McIntosh's appointed counsel and our own independent review of the record and analysis of the multiple contentions presented by McIntosh in a handwritten supplemental brief and a separate extended supplemental brief. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

An undercover drug transaction led to the arrest of McIntosh, Willie Kimbrough and Lannette Lashawn Knight. An information charged all three individuals with selling cocaine base (Health and Saf. Code, § 11352, subd. (a)). McIntosh was also charged with possessing drug paraphernalia (a glass cocaine pipe), with a special allegation he had previously served a separate prison term for a felony (Pen. Code, § 667.5, subd. (b)).[1]

Knight entered into a plea agreement, and her case was severed from the others'. McIntosh and Kimbrough waived their constitutional rights to counsel, and the trial court granted their individual requests to proceed in propria persona. (See *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562] (*Farretta*).) On February 15, 2008 the trial of McIntosh and Kimbrough commenced before a jury. On February 20, 2008 the court granted Kimbrough's request to withdraw his *Farretta* waiver and appointed the public defender's office to represent him. The court then granted Kimbrough's motion to sever his case from McIntosh's and to declare a mistrial. McIntosh's jury trial proceeded, and he continued to represent himself throughout the proceedings.

1. *Summary of Evidence Presented at Trial*

The primary issue at trial was whether McIntosh had participated in a drug transaction with Kimbrough and Knight on the evening of November 17, 2007. The

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[1] Statutory references are to the Penal Code unless otherwise indicated.

prosecution's theory was McIntosh had acted as an aider and abettor. McIntosh contended he was not involved in any drug transaction that may have occurred.

According to the People's evidence, Los Angeles Police Officer Rudy Gonzalez was working undercover with a team of officers engaged in making street-level drug arrests in downtown Los Angeles. As a "buy" officer, Gonzalez approached potential drug sellers on the street while wearing a transmitter so his conversations could be relayed to "chase" and "cover" officers. A "chase" officer detains the suspected drug seller when the transaction is completed; a "cover" officer ensures the safety of the "buy" officer at all times and looks for other potential drug sellers.

Officer Gonzalez approached McIntosh and asked if he had any "cavie," meaning rock cocaine. McIntosh replied he did not, but could take Gonzalez to someone who did. Gonzalez believed McIntosh was acting as a "hook" or a middleman who does not possess drugs but directs potential buyers to sellers, a common practice in street narcotics sales. If a drug sale results, the hook is paid in cash or drugs, typically by the seller, but occasionally by the purchaser.

McIntosh led Officer Gonzalez toward Kimbrough and Knight, who were on the street some distance away. At one point, McIntosh separated himself from Gonzalez, walked past Kimbrough and Knight and then turned to stop in front of them, blocking their path. McIntosh pointed toward Gonzalez, who caught up with Kimbrough and asked if he could get a "dub," meaning $20 worth of narcotics. Kimbrough turned to Knight and told her to break off a "slab" or a piece of rock cocaine for Gonzalez. From a small plastic bag Knight retrieved a piece of an off-white substance appearing to be rock cocaine and handed it to Gonzalez. Gonzalez then handed Kimbrough a prerecorded $20 bill.

As Officer Gonzalez walked away, McIntosh followed and repeatedly asked him for a piece of the rock cocaine. Gonzalez opined McIntosh did not know Kimbrough, so he had to demand payment from the buyer for his services as a hook. Gonzalez finally

opened his hand; and McIntosh took the rock cocaine, broke off a small piece and returned the rest to Gonzalez.

Officer Gonzalez gave a prearranged signal indicating to the officers on his team a drug transaction had occurred. McIntosh, Kimbrough and Knight were arrested. A glass cocaine pipe was found on McIntosh, but no rock cocaine. Cash, including the prerecorded $20 bill, was seized from Kimbrough's pocket. A small plastic bag containing numerous off-white solids was found on Knight. A chemist later confirmed the substance recovered in the drug transaction and the off-white solids in Knight's possession contained cocaine base.

McIntosh testified in his own defense. He said he was approached on the street by an individual who asked if McIntosh had any "cavie." When McIntosh said he did not, the individual said, "Walk with me up the street, and I'll give you a piece." McIntosh agreed, and the two men approached Kimbrough and Knight, neither of whom McIntosh had previously met. The individual then asked Kimbrough if he had any cavie. After the drug transaction "or whatever" had occurred, McIntosh asked the individual who had approached him for a "hit" or some rock cocaine, and the man refused. McIntosh walked away and was arrested minutes later.

McIntosh denied knowing Kimbrough and Knight or being a middleman for their drug transaction. McIntosh explained to the jury a middleman acts to protect the drug seller by preventing direct contact between the seller and buyer. The middleman takes the cash and delivers it to the seller, while the buyer waits. According to McIntosh, a middleman does not bring a police officer or anyone else to the seller, as occurred in the transaction described by Officer Gonzalez. McIntosh also testified, if he had known Kimbrough and Knight, he would have remained near them, asking them for rock cocaine instead of the officer.

McIntosh acknowledged he was in possession of a glass cocaine pipe when he was arrested. He also acknowledged he had previously testified the officer had offered him a piece of rock cocaine, but he did not take it.

No other witnesses testified for the defense.

2. *McIntosh's Pretrial and Trial Motions*

Prior to trial McIntosh filed two motions, which he denominated petitions for writ of habeas corpus. In one he claimed to have been unfairly treated at the jail by sheriff's department employees; he also asserted inmates needed access to the United States Post Office. In the second, McIntosh complained of the high cost of toiletries and the inadequacy of in propria persona facilities, including the jail law library, computers and legal forms. The record does not reflect a ruling on either motion/petition.

McIntosh also filed a motion to compel discovery (Evid. Code, § 1054.5), a motion to sever, a motion and a "supplemental motion" to set aside the information (§ 995) and a *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531; Evid. Code, §§ 1043-1045.) The *Pitchess* motion was taken off calendar after McIntosh acknowledged it had not been properly served. The other motions were denied. However, the court granted McIntosh's motions for the appointment of experts in toxicology, fingerprints and police procedures.

McIntosh also filed a motion to suppress evidence (§ 1538.5), which the court denied following an evidentiary hearing. In addition, the court heard and denied McIntosh's motions to dismiss for police and prosecutorial misconduct.

McIntosh made a series of motions *in limine* after trial commenced, but before the presentation of evidence, seeking to exclude from evidence a photocopy of the pre-recorded $20 bill used in the narcotics transaction, to exclude evidence of his prior conviction, to impose discovery sanctions and to disqualify the entire jury panel. The court denied all but the motion to exclude evidence of McIntosh's prior conviction.

Out of the jury's presence, Kimbrough exercised his Fifth Amendment right not to testify in McIntosh's defense. In response, McIntosh filed a motion "for Prosecutorial Misconduct/Public Defender Misconduct, Obstruction of Justice and Conspiracy," claiming the prosecutor and Kimbrough's defense counsel had engaged in witness intimidation (§ 136) by threatening Kimbrough with the withdrawal of his plea offer if he

were to testify for McIntosh. The trial court heard and denied the motion. McIntosh then sought to have admitted into evidence Kimbrough's affidavit in which Kimbrough stated he did not know or involve McIntosh in selling narcotics on the date of the offense. The court denied the motion.

3. *The Prosecution's Expert Witness*

On January 28, 2008 the trial court appointed McIntosh a toxicology expert. During the hearing on McIntosh's discovery motion, the prosecutor stated a criminalist would be testifying as a prosecution expert and a second toxicology report would be turned over to McIntosh once the final tests were completed. The witness lists produced by the prosecutor and McIntosh each included a toxicology expert.

When the prosecution's criminalist was called to testify, McIntosh moved to exclude her testimony, arguing she was not the criminalist named on the People's witness list. Out of the jury's presence, the prosecutor explained the named criminalist, who had conducted the preliminary tests for cocaine, was on vacation. Replacing her as the prosecution's expert was the criminalist involved in the final tests for cocaine. The results of both sets of tests showed the presence of cocaine. McIntosh argued he was not prepared to cross-examine this newly designated expert, having just received her toxicology report. He also stated he needed to consider preparing a defense to her testimony.

After reminding McIntosh of his decision not to have his own toxicology expert testify, the trial court denied the motion to exclude the criminalist's testimony. However, the court agreed to recess the proceedings early to allow McIntosh the rest of the day (Friday) and the weekend to prepare a defense. When the trial resumed, the criminalist testified and was cross-examined by McIntosh. The People then rested.

On Monday morning McIntosh elected to testify in his defense. Following his testimony, McIntosh rested without calling any additional witnesses.

4. *McIntosh's Request for Special or Pinpoint Instructions*

McIntosh requested the court give several special or pinpoint instructions, including one that purported to define a middleman: "To be guilty, the defendant must have possessed the money, with the requisite intent. Thus, a pure 'middleman' who merely arranges the transaction but never has possession or constructive possession of the money and is arrested before getting his or her 'take,' is not guilty of the offense. (*People v. Howard* (1995) 33 Cal.App.4th 1407.)" He also proposed an instruction explaining the defense of entrapment: "Although the determination of what police conduct constitutes impermissible entrapment must to some extent proceed on an ad hoc basis, guidance will generally be found in the application of one or both of two principles. First, if the actions of the law enforcement agent would generate in a normally law-abiding person a motive for the crime other than ordinary criminal intent, entrapment will be established. An example of such conduct would be an appeal by the police that would induce such a person to commit the act because of friendship or sympathy, instead of a desire for personal gain or other typical criminal purpose. Second, affirmative police conduct that would make commission of the crime unusually attractive to a normally law-abiding person will likewise constitute entrapment. Such conduct would include, for example, a guarranty [*sic*] that the act is not illegal or the offense will go undetected, an 'offer of <u>exorbitant</u> consideration, or any similar enticement.['] *People v. Holloway* (1996) 47 Cal.4th 1757." The trial court rejected McIntosh's proffered special instructions.

5. *Verdict and Sentencing*

McIntosh was convicted of both charges. He was sentenced to the lower term of three years for sale of cocaine base and to a concurrent term of six months for possessing drug paraphernalia. The prior prison term allegation was dismissed on the People's motion.

McIntosh received presentence custody credit of 152 days (102 actual days and 50 days of conduct credit). The trial court ordered McIntosh to pay a $200 restitution fine. A parole revocation fine was imposed and suspended pursuant to section 1202.45.

DISCUSSION

We appointed counsel to represent McIntosh on appeal. After examination of the record counsel filed an "Opening Brief" in which no issues were raised. On October 14, 2008 we advised McIntosh he had 30 days within which to personally submit any contentions or issues he wished us to consider. We granted his motion to augment the record and received handwritten supplemental briefs in which McIntosh challenged his conviction and sentence on a number of grounds. Although none of McIntosh's claims presents an arguable issue, pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, 110, 120-121, we identify McIntosh's contentions and explain the reasons they fail.

1. *Adequacy of the Jail Law Library*

As he did in the trial court, McIntosh contends he was denied adequate law library facilities at the jail law library.[2] (McIntosh also requested the trial court authorize the deposit of $898 in his in propria persona account for the purchase of law books.) He argues the jail law library puts in propria persona defendants "at a serious disadvantage, deliberately" by providing deficient computers, law books and legal forms and no librarian or legal assistant to instruct prisoners on using the computer.

McIntosh's complaints are merely anecdotal: "[A]n inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense . . . . [T]he inmate . . . must go

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[2] Although no formal ruling on McIntosh's motion/petition asserting this claim in the trial court appears in the record on appeal, we assume it was denied. To the extent McIntosh properly denominated his request a petition for writ of habeas corpus, rather than a pretrial motion, it is not subject to appeal. (*In re Clark* (1993) 5 Cal.4th 750, 767, fn. 7; *In re Hochberg* (1970) 2 Cal.3d 870, 876, disapproved on other grounds in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3.) Nonetheless, for purposes of judicial efficiency and economy, we consider the claim on its merits. (See *In re Clark*, at p. 767, fn. 7.)

one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." (*Lewis v. Casey* (1996) 518 U.S. 343, 351 [116 S.Ct. 2174, 135 L.Ed.2d 606].) McIntosh does not allege, much less demonstrate, he suffered any actual prejudice as a result of the purported inadequacies he described. Indeed, according to the record, McIntosh never again complained about the existing law library facilities after the trial court directed the sheriff's department's in propria persona module at the jail to allow McIntosh to exercise his privileges to the full extent required by law. Moreover, McIntosh made multiple motions both before and at trial, interposed numerous objections during the examination of witnesses and prepared special jury instructions citing legal authority and presenting legal arguments, all of which were presumably derived from his research at the jail facilities. Under the circumstances McIntosh has failed to establish any of his constitutional rights were violated as the result of the claimed inadequacies of the law library facilities.

2. *Substantial Evidence*

Substantial evidence supports the jury's finding McIntosh aided and abetted the sale of rock cocaine to Officer Gonzalez. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Gonzalez's testimony McIntosh understood his request for drugs in the street vernacular, escorted him to sellers Kimbrough and Knight, remained with him during the transaction and demanded a share of the proceeds was sufficient evidence to support the verdict. (*Ibid*.) Determining witness credibility is the exclusive province of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Nothing in the record suggests Gonazlez's testimony was inherently improbable or physically impossible. (See *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372.)

3. *Absence of the Marked $20 as Evidence*

As he did at trial, McIntosh makes much of the People's failure to introduce into evidence the prerecorded $20 bill that Officer Gonzalez handed to Kimbrough in

purchasing the rock cocaine.[3] During the officer's testimony, McIntosh objected to the introduction into evidence of a photocopy of the bill, arguing jurors should be afforded the opportunity to examine the actual "buy money."[4] McIntosh also objected to the officer's testimony "buy money" came from the Office of the Secret Service, arguing this testimony had to be corroborated by documentary evidence. McIntosh revisits these claims on appeal and maintains without the actual buy money and the corroborating evidence of its origin the People failed to prove a drug transaction occurred. However, whether the marked $20 bill was indeed counterfeit is irrelevant. So long as Kimbrough and Knight believed the $20 bill was genuine, prompting them to exchange their rock cocaine for that money, there was sufficient evidence of drug transaction. (See Judicial Council of Cal. Crim. Jury Instns. (2008) CALCRIM No. 2300.)

4. *The People's Failure To Timely Disclose Their Expert Witness*

McIntosh contends the People's criminalist was a surprise witness, whose testimony should have been excluded; and he claims to have been prejudiced by the appearance of this witness and the delayed disclosure of her report because he had no time to prepare his cross-examination or to rebut her testimony. The record belies these claims.

McIntosh voiced similar concerns in the trial court. The trial court responded by giving him time to prepare for the witness, yet McIntosh completed his cross-examination of the criminalist that day and failed to ask to resume questioning her at a later date. Nor did McIntosh have his own toxicology expert, appointed by the court, testify in his defense when trial resumed, electing instead to testify as the sole defense

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[3] Apparently McIntosh did not subpoena the prerecorded $20 bill.

[4] In one of his motions in limine McIntosh argued only the original, rather than a photocopy, of the prerecorded money was admissible under the best evidence rule (Evid. Code, § 1500), which was repealed in 1998. (Stats. 1998, ch. 100, § 1, p. 299, *operative Jan. 1, 1999*.) The court properly denied the motion. (See Evid. Code, § 1521, subd. (a) [secondary evidence admissible to prove content of writing].)

witness. McIntosh was not prejudiced in any way by the delay in identifying the expert witnesses, which, in any event, was adequately explained by the prosecutor.

5. *The Rejected Special or Pinpoint Instructions*

McIntosh contends the trial court committed prejudicial error by refusing his proposed instructions on what constitutes a middle man and on the defense of entrapment. Both instructions were properly rejected.

The trial court, of course, must instruct the jury on all general principles of law necessary for the jury to properly perform its function: "'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) In addition, in appropriate circumstances a requested jury instruction may be required that pinpoints the defense's theory of the case. (*People v. Bolden* (2002) 29 Cal.4th 515, 558; *People v. Wharton, supra,* 53 Cal.3d at p. 570.) "But a trial court need not give a pinpoint instruction if it is argumentative [citation], merely duplicates other instructions [citation], or is not supported by substantial evidence." (*Bolden*, at p. 558.)

The trial court's decision not to give the proposed instruction on the defense of entrapment was proper. McIntosh's theory at trial was not that he was induced by law enforcement to aid and abet a drug transaction, but that he neither knew of, nor participated in, the rock cocaine sale. The purpose of a pinpoint instruction is to reflect the defense presented. (*People v. Wharton, supra,* 53 Cal.3d at pp. 570-571; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885.)

The trial court's refusal to give McIntosh's special instruction on what constitutes a middleman was also proper. The instruction, derived from *People v. Howard, supra,* 33 Cal.App.4th 1407, does not contain an accurate or appropriate definition of a middleman, at least insofar as the evidence in this case is concerned.

In *Howard*, defendants were convicted of conspiring to traffic in cocaine and unlawfully possessing in excess of $100,000 in a reverse undercover sting operation. One defendant, acting as a middleman, arranged for his codefendant to buy drugs from two sellers, who were undercover police officers. The middleman defendant arrived at the scene with no purchase money. His codefendant arrived separately with the purchase money. (*Howard, supra*, 33 Cal.App.4th at pp. 1412-1413.) As to the middleman defendant, the appellate court reversed the conviction of unlawfully possessing in excess of $100,000 because there was no evidence he had actual or constructive possession of his codefendant's purchase money. (*Id*. at pp. 1418-1420.) The language adopted by McIntosh to define a middleman concerned only the specific facts of the *Howard* case. Consequently, McIntosh's proposed instruction misstated the law and was properly refused. (See *People v. Gurule* (2002) 28 Cal.4th 557, 657 [court may properly refuse pinpoint instruction that is an incorrect statement of law].)

6. *Other Issues*

To the extent other issues are perfunctorily asserted by McIntosh—namely McIntosh did not timely receive in propria persona funds, Kimbrough was coerced into exercising his Fifth Amendment right not to testify, McIntosh was entitled to have been present at his codefendants' plea hearings, McIntosh was illegally committed following his preliminary hearing and the trial court was biased against him—they are entirely devoid of either evidentiary or legal support and, in an any event, have been abandoned in light of the lack of legal argument, citation to authority or reference to the record. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37.)

We have examined the entire record and are satisfied McIntosh's attorney has fully complied with the responsibilities of counsel and no arguable issues exist. (*Smith v. Robbins* (2000) 528 U.S. 259, 277-284 [120 S.Ct. 746, 145 L.Ed.2d 756]; *People v. Kelly*, *supra*, 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

The judgment is affirmed.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.